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STESYEN MINYAK KUALA NERUS SDN BHD & ANOR v. KHAIRUL ANUAR MUDA & ORS

HIGH COURT MALAYA, KUALA TERENGGANU
ABDUL WAHAB MOHAMED JC
[CIVIL SUIT NO: TA-22NCvC-32-09-2018]
B 26 MARCH 2019

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out writ and statement of claim – Company commenced suit against defendants – Whether there was written resolution to commence suit – Whether all directors of company authorised commencement of suit – Whether resolution issued valid – Whether company had necessary locus standi to commence suit against defendants – Whether suit abuse of court process – Whether suit ought to be struck out – Rules of Court 2012, O. 18 r. 19(1)(a), (b) & (d)*

CIVIL PROCEDURE: *Res judicata – Action – Company commenced suit against defendants – Issue raised in present court same as issue raised in previous court – Whether both suits arose from same set of facts, background, issues, circumstances and cause of action – Whether issue raised in present court already decided in previous court – Whether principle of res judicata applied – Whether company estopped from raising same issue – Whether abuse of court process – Whether suit in present court ought to be struck out – Rules of Court 2012, O. 18 r. 19(1)(a), (b) & (d)*

The second plaintiff, the defendants and one Sulong Muda ('Sulong') were the beneficiaries to the estate of Muda Hj Draman ('deceased') who died intestate. The second plaintiff and Sulong were appointed as the administrators to manage and/or administer the deceased's estate ('the estate'). The deceased, during his lifetime, had two businesses of Shell Petrol Station at Cabang Tiga and Kuala Nerus ('petrol stations') but the operating licence for these petrol stations expired and/or was cancelled upon his death. The second plaintiff proceeded to form two companies for the application of the operating licence where the second plaintiff, Sulong and the fourth defendant were directors. In 2012, the defendants commenced an action at the High Court against the second plaintiff and Sulong ('main suit') which was dismissed. However, the decision was overturned by the Court of Appeal where it was held that, *inter alia*, the administrators were authorised to take over the business management of the petrol stations and the profits made were to be distributed. In 2018, the High Court allowed the application made by the first and ninth defendants to replace the second plaintiff and Sulong as the administrators of the estate. In the present suit, the plaintiffs submitted that the first and ninth defendants had attempted, without the first plaintiff's permission and valid court order, to enter and take over the Kuala Nerus Petrol Station ('KN Petrol Station') and to block and/or interfere with

the first plaintiff's bank accounts. It was the plaintiffs' case that (i) the actions and/or attempts made by the first and ninth defendants caused the plaintiffs to suffer losses or damages; and (ii) the first plaintiff, which was established after the deceased's death, was not part of the estate and the defendants did not have any right and/or interest over the first plaintiff. The defendants applied to strike out the plaintiffs' suit, pursuant to O. 18 r. 19(1)(a), (b) and/or (d) of the Rules of Court 2012 ('ROC'), on the grounds that (i) the first plaintiff did not have the *locus standi* to file this action against the defendants as no resolution had been issued by the first plaintiff to file the suit; (ii) the plaintiffs' suit was *res judicata* as issues raised by the plaintiff had been previously determined in the main suit, decision of which was overturned by the Court of Appeal; and (iii) the plaintiffs were estopped from raising the issue that the first plaintiff was not a property of the deceased as, in the main suit, they had admitted that the businesses of the petrol stations belonged to the deceased.

Held (allowing defendants' application; striking out plaintiffs' suit):

(1) There was a written resolution to commence this suit, evinced by the resolution signed by two out of three directors of the first plaintiff. However, another signature of a director of the first plaintiff, who was made a defendant in this suit (the fourth defendant), was absent from the resolution. The fourth defendant made a statutory declaration ('SD') stating that he had not, by way of a resolution and/or agreement, authorised the first plaintiff to commence this suit against him and the other defendants. He had also confirmed that he had not authorised the second plaintiff to act on behalf of the first plaintiff in the commencement of this suit. It was apparent from the SD that the fourth defendant had not assented to the commencement of this suit and the continuation of the same. The plaintiffs acted contrary to article 90 of the article of association of the first plaintiff, which required such resolution to be signed by all directors of the first plaintiff. In addition to that, the resolution was also not dated nor was it affirmed by the company secretary. (paras 32 & 34)

(2) There was no evidence that notice had been given to all directors of the first plaintiff with regards to the resolution, which had been passed by the Board of Directors authorising the commencement of this suit. The resolution was invalid, null and void. Consequently, the first plaintiff was not the proper and/or correct party and did not have the necessary *locus standi* to institute these proceedings against the defendants. The plaintiffs' claim ought to be struck out, on this substantive ground alone, as it constituted an abuse of the process of the court. (para 35)

(3) In considering the applicability of the doctrine of *res judicata*, a careful comparison of the two sets of proceedings must be undertaken to answer whether the present court was invited to deal with exactly the issue already dealt with by the previous court. Upon careful evaluation of the pleadings made by the parties in the main suit, it was clear that both cases arose from the same set of facts, background, issues and circumstances as well as cause of action. The Court of Appeal had, in its decision in respect of the main suit, determined on the issue of the business ownership of the KN Petrol Station. The issues which the plaintiffs sought to litigate had been litigated as evident from the findings of the Court of Appeal which was final. It was thus binding on this court and all parties and may not re-open the same. The plaintiffs were estopped from raising the issues for the second time regarding the right to the estate. (paras 44-46)

(4) The second plaintiff was evidently a party in the main suit and the first plaintiff was privy to some of the parties in the main suit. Cause of action estoppel, where applicable, was an absolute bar to re-litigation between the same parties or their privies. The present action was, in fact, no more than a repetition, in a thinly veiled new guise of the cause of earlier proceedings in the main suit which had been previously determined by the Court of Appeal and tantamount to an abuse of the process of court. The instant case was clearly caught by the doctrine of *res judicata*. (para 47)

(5) The plaintiffs' case was obviously unsustainable as it was caught by O. 18 r. 19(1)(a),(b) and/or (d) of the ROC. It was a plain and obvious case to be struck out. (para 48)

Case(s) referred to:

AIC Dotcom Sdn Bhd v. MTEX Corporation Sdn Bhd & Ors [2003] 7 CLJ 149 HC ***(refd)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Carl-Zeiss Stiftung v. Rayner and Keeler Ltd & Ors (No 2) [1966] 2 All ER 532 ***(refd)***
Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062 CA ***(refd)***
Enersafe Sdn Bhd v. Megarina Sdn Bhd [2006] 2 CLJ 1021 CA ***(refd)***
Everise Hectares Sdn Bhd v. Citibank Bhd [2011] 2 CLJ 25 CA ***(refd)***
Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors And Other Appeals [2003] 4 CLJ 505 CA ***(refd)***
Foss v. Harbottle [1843] 67 ER 189 ***(refd)***
Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd [2012] 10 CLJ 88 CA ***(refd)***

Ikatan Kelab-Kelab Melayu Negeri Pulau Pinang & Ors v. Yayasan Bumiputra Pulau Pinang & Ors and Another Appeal [2013] 9 CLJ 941 FC ***(refd)***
Kok Hoong v. Leong Cheong Kweng Mines Ltd [1963] 1 LNS 61 PC ***(refd)***
Malaysia Land Investment Co (Pte) Ltd v. Sathask Relaty Sdn Bhd & Ors [2001] 1 MLJ 451 ***(refd)***
Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Bhd [2013] 8 CLJ 329 CA ***(refd)***
Norma Awang Had & Nazli Awang Had (Suing as the administrators/Executors of the Estate of Tan Sri Dato' Awang Had Salleh, Deceased) & Anor v. Dato' Dr Haji Mohamed Haniffa Haji Abdullah [2016] 1 LNS 1136 CA ***(refd)***
North West Water Ltd. v. Binnie & Partners (a firm) [1990] 3 All ER 548 ***(refd)***
OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 CA ***(refd)***
See Thong & Anor v. Saw Beng Chong [2012] 1 LNS 817 CA ***(refd)***
Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***
Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur [2009] 1 LNS 1457 HC ***(refd)***
Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***
Small Medium Enterprise Development Bank Malaysia Bhd v. Blackrock Corporation Sdn Bhd & Ors [2017] 9 CLJ 45 CA ***(refd)***
Wawasan Dengkil Properties Sdn Bhd & Ors v. Khoo Peng Lai & Ors [2016] 9 CLJ 517 CA ***(refd)***

Legislation referred to:
Companies Act 2016, s. 21(1)(a)
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)

For the plaintiffs - M/s WA Wan Adnan & Assocs
For the defendants - M/s Nordin Kassim & Aziz

Reported by Najib Tamby

JUDGMENT

Abdul Wahab Mohamed JC:

Introduction

[1] This is an application by the defendants by way of a notice of application dated 12 November 2018 (encl. 16) to strike out the plaintiffs' writ and statement of claim pursuant to O. 18 r. 19(1)(a) and/or (b) and/or (d) of the Rules of Court 2012 (RC 2012).

Background Facts

[2] The first plaintiff is a company established on 16 October 1985 under the Companies Act 1965 with registered address at Lot 3899, 3rd Floor, Jalan Sultan Sulaiman, 20000 Kuala Terengganu, Terengganu.

[3] The second plaintiff, the defendants and one other individual Sulong bin Muda ("Sulong") are the beneficiaries to the estate of Muda bin Haji Draman ("the deceased") whom had died intestate on 28 April 1985.

[4] Through the granting of letter of administration of the estate under application no. 44-16 year 1988 ("the letter of administration"), the second plaintiff and Sulong were appointed as the administrators to the estate of the deceased to manage and/or administer estate of the deceased as listed on the list of assets which was attached together with the letter of administration ("list of assets").

[5] An order was made by the Shari'a Court of Kuala Terengganu on 11 July 2006 for the distribution of the estate of the deceased to the beneficiaries to be in accordance with the Faraid Law.

[6] The deceased, during his lifetime had two businesses of Shell Petrol Station at Cabang Tiga and Kuala Nerus. The Cabang Tiga Petrol Station was built on land belonging to Shell while the Kuala Nerus Petrol Station was built on land belonging to the deceased.

[7] The operating license for the two said petrol stations granted by Shell Malaysia Trading Sdn Bhd under the name of the deceased had expired and/or cancelled upon death of the deceased. Upon the advice of Shell Malaysia Trading Sdn Bhd, the second plaintiff had proceeded to form two companies for the application of the operating license where the second plaintiff, Hj Sulong bin Hj Muda and the fourth defendant was made Director of the said companies.

[8] The first plaintiff was granted the right of trading in respect of the Kuala Nerus Petrol Station pursuant to "Shell Filling/Service Station Operating Agreement" dated 1 January 1987 entered into between the first plaintiff and Shell Malaysia Trading Sendirian Berhad.

[9] It was therefore the plaintiff's case that the first plaintiff company which was established after the death of the deceased was not part of the deceased's estate and thus the heirs of the deceased including the defendants do not have any right and/or interest over the first plaintiff.

[10] An agreement dated 12 December 1991 was entered into between the 15th defendant, 16th defendant, 17th defendant, second plaintiff and Hj Sulong bin Hj Muda and the terms of the agreement among others provides that the Kuala Nerus Petrol Station be transferred to the second plaintiff and as payment for the said transfer, the second plaintiff shall pay RM450,000 to clear off the bank's debt.

[11] The defendants had *via* writ of summons and statement of claim dated 5 November 2014 commenced Civil Suit No. 22NCVC-35-11-2014 at the Kuala Terengganu High Court against the second plaintiff and Hj Sulong bin Hj Muda in their capacity as joints administrators to the estate of the deceased. The said action was dismissed on 30 November 2015 by the High Court.

[12] The Court of Appeal had however on 6 July 2017 (Rayuan Sivil No: T-02(NCVC)(W)-37-01-2016) overturned the findings of facts and the decision of the High Court and had held *inter alia* that the defendants' claim was not time-barred, that the agreement entered into was null and void and that administrators are authorised to take over the business management of the two petrol stations and the profits made to be distributed in accordance with the order made by the Shari'a Court of Kuala Terengganu dated 11 July 2006 calculation of profits beginning from the same date.

[13] The High Court of Kuala Terengganu had on 31 July 2018 allowed the application made by the first and ninth defendants to replace the second plaintiff and Hj Sulong bin Hj Muda as administrators of the estate of the deceased.

[14] It was plaintiffs' case that the first and ninth defendants had on several occasions attempted to enter and take over the Kuala Nerus Petrol Station without the first plaintiff's permission and without a valid court order against the first plaintiff.

[15] The plaintiffs further claimed that the first and ninth defendants had attempted to block and/or interfere with the bank accounts of the first plaintiff with RHB Bank Berhad, Maybank and CIMB Bank Berhad without the first plaintiff's permission and without a valid court order against the first plaintiff. It was therefore the plaintiffs' case that the actions and/or attempts made by the first and ninth defendants had caused the plaintiffs to suffer loss of damages, expenses incurred and loss of income.

Defendants Submission

[16] The defendants had raised the following defences:

(i) Issues giving rise to the cause of action in the present case had been raised before the High Court of Terengganu in Civil Suit No. 22NCVC-35-11 Tahun 2014 ("the main suit") and had been fully determined by the High Court in the main suit. The decision of the High Court had been appealed against and had been overturned by the Court of Appeal in Civil Appeal No. T-02(NCVC)(W)-37-01 Tahun 2016. The said matter was further brought to the Federal Court (Permohonan No. 08-342-08-2017).

(ii) The same issues had been raised in the Originating Summons No. TA-31NCvC-14-01-2018 at the High Court of Kuala Terengganu. Decision of the High Court had been maintained and was not appealed against by the second plaintiff.

(iii) The issues raised before this court had already been conclusively determined, the present writ was therefore barred by the doctrine of *res judicata* and estoppel.

(iv) The writ is scandalous, frivolous and vexatious.

(v) The present writ is repetitive in nature.

[17] In this application to strike out the plaintiffs' suit, the defendants submitted that the first plaintiff does not have *locus standi* to file this action against the defendants as no resolution had been issued by the first plaintiff to file the present suit.

[18] It was also the defendants' submission that the plaintiffs' suit was barred by the doctrine of *res judicata* as issues raised by the plaintiffs in the present suit had been previously determined by the High Court of Kuala Terengganu in the main suit, decision of which had been appealed against and was overturned by the Court of Appeal in Civil Appeal No. T-02(NCVC)(W)-37-01 Tahun 2016. Decision of the Court of Appeal was affirmed by the Federal Court (Permohonan No. 08-342-08-2017).

[19] The defendants further submitted that the plaintiffs had in the main suit admitted that the Kuala Nerus Petrol Station and the Cabang Tiga Petrol Station were businesses belonging to the deceased and are therefore estopped from raising the issue that the first plaintiff (new business) is not a property of the deceased.

Plaintiffs Submission

[20] It was the plaintiffs' submission that the first plaintiff has an unlimited capacity to sue and be sued under s. 21(1)(a) of the Companies Act 2016. It was also the plaintiffs' submission that a resolution had been passed by the first plaintiff in accordance with art. 90 and 93 of the Articles of Association to commence an action against the defendants in the present suit as the said resolution had been signed by two out of three directors of the first plaintiff company.

[21] The plaintiffs contended that doctrine of *res judicata* and estoppel is not applicable to the present case as there are serious and material issues to be tried and the first plaintiff was not made party to any of the previous suits.

[22] One of the main issues to be determined in the present case as submitted by the plaintiffs was whether the first plaintiff was the legitimate company to manage and/or operate the business of the Kuala Nerus Petrol Station located on Batu 8, Jalan Kelantan, 21200 Kuala Terengganu, Terengganu as appointed by Shell Malaysia.

[23] It was also the plaintiffs' contention that the first plaintiff was established after the death of the deceased and was therefore not part of the deceased's estate. The plaintiffs had therefore submitted that the heirs to the deceased have no right and/or interest over the first plaintiff company.

The Law On Striking Out

[24] Order 18 r. 19 of the RC 2012 clearly provides the court the power to strike out a claim and/or pleading at any stage of the proceeding which reads as follows:

> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[25] It is settled law that recourse to this summary process can only be adopted when it can clearly be seen that the claim is on the face of it obviously unsustainable. The summary power should be exercised in plain and obvious cases only and where the claim on the face of it is obviously bound to fail (*Enersafe Sdn Bhd v. Megarina Sdn Bhd* [2006] 2 CLJ 1021). This proposition is clearly explained in the Federal Court's case of *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1 at p. 698 (CLJ): p. 18 (MLJ) as follows:

> … We also make this observation on the application of the court's summary power to strike out a pleading under Order 18 r. 19 of the Rules of Court 2012 (successor to RHC 1980). *Although the power to strike out is a wide discretion, it should be exercised with care and only when the threshold requirement of 'an obvious and unsustainable case*', can a pleading be struck out. In exercising it, and especially under r. 19(1)(a), the court must have regard to the 'quality of an all the circumstances surrounding the plea (see *Lembaga Kumpulan Wang Simpanan Pekerja v. Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja* [2000] 2 AMR 2119 (FC). The court should also bear in mind that the effect of striking out a pleading is to completely deprive a plaintiff from having his day in court.
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> (emphasis added)

[26] In the Supreme Court case of *Bandar Builder Sdn. Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 and *Metroplex Holdings Sdn. Bhd. v. Commerce Merchants Bankers Bhd* [2013] 8 CLJ 329; [2013] 4 MLJ 520 Mohamed Dzaiddin bin Hj Abdullah SCJ on the legal principles of striking out had held as follows:

> The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. *It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in Hubbuck v. Wilkinson [1899] 1 QB 86, p. 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable"* (*Attorney-General of Duchy of Lancaster v. L. & N.W. Ry. Co.* [1892] 3 Ch. 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v. Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 Rules of the High Court) (*Hubbuck v. Wilkinson) (supra).* **The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.**
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> (emphasis added)

[27] This court also found much guidance from the Federal Court case of *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1 (TAB 3 DBOA), where Ramly Ali FCJ held as follows:

> [26] The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder (supra)* are, *inter alia* as follows:
>
> (a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;
>
> (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it **'obviously unsustainable'** (emphasis added);
>
> (c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence; and
>
> (d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 of the ROC; and
>
> (e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[28] In the Court of Appeal case of *See Thong & Anor v. Saw Beng Chong* [2012] 1 LNS 817; [2013] 3 MLJ 235, judges are reminded as follows:

> the power to strike a case under the order without having to go for trial should be exercised sparingly and only in a plain and obvious case. The procedure is of a summary nature. The party affected should not be deprived of his right to have his case proceeded by a proper trial unless the claim is obviously unsustainable. The Federal Court in the case of *CC Ng & Brothers Sdn Bhd v. Government of State of Pahang* [1985] 1 MLJ 347, had said that 'the inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with utmost caution' – per Seah FJ. It is a power which ought to be very sparingly exercised and only in very exceptional cases (per Lord Herschell in *Lawrence v. Norrey* – as cited in *CC Ng & Brothers*).

[29] Guided by the above principles, I hereby proceed to determine issues raised by the defendants in their striking out application in the following order:

(i) Whether the first plaintiff has *locus standi* to file an action against the defendants; and

(ii) Whether the plaintiffs' suit is barred by the doctrine of *res judicata* and/or estoppel.

Locus Standi

[30] It is clear from the cases of *AIC Dotcom Sdn Bhd v. MTEX Corporation Sdn Bhd & Ors* [2003] 7 CLJ 149 and *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88; [2011] 1 LNS 1767 that a finding on no *locus standi* comes within the meaning of the term of "frivolous and vexatious". As rightly submitted by the defendants, a party who wishes to commence a suit has to first show that he has a necessary *locus standi* to do so. Failure to do so would entitle the defendants to apply to strike out the claim (see Federal Court decision in *Ikatan Kelab-Kelab Melayu Negeri Pulau Pinang & Ors v. Yayasan Bumiputra Pulau Pinang & Ors and Another Appeal* [2013] 9 CLJ 941; [2014] 1 MLJ 27).

[31] In *Foss v. Harbottle* [1843] 67 ER 189, the English Court propounded the proposition that in company law, if a wrong had been done to a company, then it was the company which was the proper plaintiff in an action brought to redress the injury.

[32] In the present case, there was in fact a written resolution to commence this suit as evident from the resolution signed by two out of three directors of the first plaintiff company (SMS1).

[33] Another director of the first plaintiff company was made a defendant in this suit ie, the fourth defendant whose signature was absent from the said resolution. The fourth defendant had made a statutory declaration dated 25 October 2018 (exh. KAM1) stating that he had not by way of a resolution and/or agreement authorised the first plaintiff to commence this suit against him and other defendants. He had also confirmed that he had not authorised the second plaintiff to act on behalf of the first plaintiff in the commencement of this suit. It is thus apparent from the said statutory declaration that the fourth defendant had not assented to the commencement of the suit and the continuation of the same.

[34] The resolution authorising the commencement of this suit was also not dated nor was it affirmed by the company secretary. The plaintiffs had also acted contrary to art. 90 of the Article of Association of the first plaintiff which requires such resolution to be signed by all directors of the first plaintiff. The said art. 90 reads as follows:

> A resolution in writing, **signed by all the directors present in Malaysia** for the time being entitled to receive notice of a meeting of the directors, shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held. (emphasis added)

[35] There was no evidence to show that notice had been given to all directors of the first plaintiff with regards to the resolution which had been passed by the Board of Directors authorising the commencement of this suit. In view of the above evidence, I am of the considered view that the resolution (SMS1) was therefore invalid, null and void. Consequently, the first plaintiff was not the proper and/or correct party, and does not have the necessary *locus standi*, to institute these proceedings against the defendants. On this substantive ground alone, the claim of the plaintiffs ought to be struck out as it constitutes an abuse of the process of the court (*Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12; *Malaysia Land Investment Co (Pte) Lts v. Sathask Relaty Sdn Bhd & Ors* [2001] 1 MLJ 451).

[36] Notwithstanding what have been stated above, for completeness purpose, I shall nevertheless delve into the issue of *res judicata* and estoppel as raised by the defendants.

Res Judicata And/Or Estoppel

[37] The underlying policy is that litigants should not be vexed twice in the same matter and that the public policy requires a finality in litigation. The doctrine of *res judicata* was succinctly explained in the case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 where Peh Sweh Chin FCJ (as His Lordship then was) stated as follows:

What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari proeadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

...

The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v. Henderson* (1843) 3 Hare 100 at p 115 which is:

The pleas of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

...

To revert to that famous passage set out above, the next step is to state our view on its scope of operation or approach towards such scope which has given rise to certain controversial aspects referred to earlier. Bearing in mind the well-known relevancy of a previous judgment in barring a second suit, eg, please see s. 40 of the Evidence Act 1950, it will be readily understood that when Wigram VC spoke of 'points', the points should actually include causes of action, or all causes of action which one of two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties. The relevant case law revolves itself into this understanding. Lack of this understanding causes, in our view, a fair share of the confusion in connection with the famous passage of Wigram VC which Lord Shaw in *Hoystead v. Taxation Commissioner* [1962] AC 155 at p. 170 spoke of as 'settled law' in the Privy Council.

Thus, there are in fact two kinds of estoppel *per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.

[38] In the case of *North West Water Ltd. v. Binnie & Partners (a firm)* [1990] 3 All ER 548 Drake J (as he then was) stated that cause of action estoppel was confined to cases where the cause of action and the parties were the same in the second suit as they were in the first suit. In such a case the bar is absolute (*OCBC Bank (Malaysia) Bhd. v. Kredin Sdn. Bhd.* [1997] 2 CLJ 534).

On the other hand, issue estoppel would involve going over precisely the same issue or point already decided in the first action or refer to an issue that has been previously litigated and determined between the same parties and the same issue is raised in a subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to reopen the issue. The High Court decision in *Seruan Gemilang Makmur Sdn. Bhd. v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur* [2009] 1 LNS 1457; [2010] 8 MLJ 57 clearly shows that the requirements of issue estoppel are that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised and that the same question had been decided.

[39] On the meaning of the term "privies", it was stated by the Court of Appeal in the case of *Everise Hectares Sdn Bhd v. Citibank Bhd* [2011] 2 CLJ 25 as follows:

> When you talk about "privies", Lord Reid in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd, & Others; Rayner & Keeler Ltd & Others v. Courts and Others* [1967] 1 AC 853, HL, said at p. 910 that "there must be privy of blood, title or interest: here it would have to be privy of interest".
>
> A judicial determination directly involving an issue of the fact or law disposes once and for all the issue, so that it cannot afterwards be raised between the same parties or their privies ...

[40] The Court of Appeal in the case of *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062; [2016] 3 MLJ 122 had with reference to the *North West Water Ltd (supra)* went on to hold that the doctrine of *res judicata* applies also to parties to the proceedings in which the issue estoppel is raised even if the parties in the later suit are completely different from the parties in the previous suit as follows:

> [21] A pertinent question which may inevitably be asked is whether there is any limit which should be put on the application of the doctrine of issue estoppel. We raise this question because, contrary to the above requirement that the parties to the judicial decision are the same persons as to the parties to the proceedings in which the issue estoppel is raised, the parties in this appeal are completely different from the parties in the HTF suit.
>
> ...
>
> [23] Now reverting to the question we raised above, it is important to ask whether it is an inflexible rule that the parties to the judicial decision must be the same persons as the parties to the proceedings in which the estoppel is raised. Before stating our answer to this question consideration of the local and foreign authorities is necessary.

[24] In *North West Water Ltd. v. Binnie & Partners (a firm) supra*, three defendants namely the consultant engineers, the water authority and the contractors were sued for negligence but only the consultant engineers were wholly found to be negligent. In subsequent separate proceedings where the water authority issued proceedings against the consultant engineers based on contract and negligence to recover damages, the Court stated that consideration of the authorities reveal two schools of thought on the issue of the limits which should be put on the application of the doctrine of estoppel. One approach was called the broad one which held that the true test of an issue estoppel was whether for all practical purposes the party seeking to put forward some issue had already had that issue determined against him by a court of competent jurisdiction, even if the parties to the two actions were different. The conflicting approach was to confine issue estoppel to that species of estoppel per *rem judicatam* that may arise in civil actions between the same parties or their privies. Drake J in preferring the broader approach to a plea of issue estoppel said:

> In my judgment, this broader approach to a plea of issue estoppel is to be preferred. I find it unreal to hold that the issues raised in two actions arising from identical facts are different solely because the parties are different or because the duty of care owed to different persons is in law different. However, I at once stress my use of the word solely. I think that great caution must be exercised before shutting out a party from putting forward his case on the grounds of issue estoppel or abuse of process. Before doing so the court should be quite satisfied that there is no real or practical difference between the issues to be litigated in the new action and that already decided, and the evidence which may properly be called on those issues in the new action.

[25] In the present appeal, since the present action would undoubtedly involve going over precisely the same facts as in the previous HTF suit, and accepting the broader approach and the wider sense of *res judicata* as the preferred and correct legal position, *the fact that the parties to this suit are different from the HTF suit does not disentitle the appellant to invoke the doctrine of issue estoppel to bar the respondent from relitigating a specific issue that had been decided in the prior separate action. The doctrine also applies to a non-party. It is therefore not necessary for parties to be the same in both actions.* What the doctrine seeks to prevent is an abuse of the process of the Court by attempting to make a double claim as well as allowing the plaintiff to relitigate its cause for the same relief and based on the same subject matter for which judgment had successfully been obtained in the HTF suit and to produce the same set of facts, the same witnesses and the same documents (see *Seruan Gemilang Makmur Sdn. Bhd. v. Badan Perhubungan UMNO Pahang Darul Makmur, supra*). (emphasis added)

[41] On the doctrine of *res judicata*, it is important to appreciate that this doctrine has its root in equity and hence retains its discretionary nature that is common to all equitable doctrines (see *Small Medium Enterprise Development Bank Malaysia Bhd v. Blackrock Corporation Sdn Bhd & Ors* [2017] 9 CLJ 45). Since the doctrine is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result as may be observed from the case of *Carl-Zeiss Stiftung v. Rayner and Keeler Ltd & Ors (no. 2)* [1966] 2 All ER 532 as follows:

> As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case [1938] 4 All ER 747 at page 755; [1939] AC 1 at p 21). All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

[42] In deciding whether a matter is caught by *res judicata*, the earlier judgment must with precision, determine the point in issue. Support for this proposition can be found in the decision of the Court of Appeal in the case of *Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors (And Other Appeals)* [2003] 4 CLJ 505 where it was held as follows:

> When the plea of *res judicata* is raised, it is necessary to identify with precision the issue that was decided in the earlier proceeding. In other words, the earlier judgment must, necessarily and with precision, determine the point in issue.

See also the case of *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1963] 1 LNS 61; [1964] MLJ 49.

[43] Since the plaintiff in this case is relying on the operation of the issue estoppel, it is pragmatic to also refer to the Federal Court's observations on the same. On this, the Federal Court observed:

> On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie, that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties … neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in *Lawlor v. Gray* [1984] 3 All ER 345 at p 350, who said: 'Issue estoppel … prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action.'

[44] Applying the above legal principles to the present suit, it is clear that in considering the applicability of the doctrine of *res judicata*, a careful comparison of the two sets of proceedings must be undertaken. The object of such an exercise being to answer whether the present court is invited to deal with exactly the issue already dealt with by the previous court (see *Wawasan Dengkil Properties Sdn Bhd & Ors v. Khoo Peng Lai & Ors* [2016] 9 CLJ 517).

[45] Upon careful evaluation of the pleadings made by parties in the main suit, it appears to me as clear as day that both cases arose from the same set of facts, background, issues and circumstances as well as cause of action. The Court of Appeal had in its decision dated 30 October 2017 (exh. KAM8) in respect of the main suit determined on the issue of business ownership of the Kuala Nerus Petrol Station as follows:

> [19] We come now to the final issue which merited consideration. This concerned the finding by the learned Judge that the business of the two petrol stations ended with the death of the deceased and the subsequent setting up of the new business by the defendants. What remained, it was found by the learned judge, were only the debts due as left behind by the deceased which had to be dealt with by all the beneficiaries. In other words, the profits generated by the new business set up by the defendants were no longer tied to the estate of the deceased and hence the said profits could not be divided among the beneficiaries as contended by the plaintiffs.
>
> [20] With respect, we are compelled to observe that this finding overlooks the important fact that in the case of the Kuala Nerus petrol station, the deceased had used his own land to develop the station. It was only the petrol station at Cabang Tiga which sat on the land of the petrol company called Shell. It cannot be denied that the land of the deceased, on which the Kuala Nerus petrol station was situated, became estate property upon the death of the deceased. It was also obvious to us that the same business that was conducted by the deceased before his death continued but with the variations as requested by Shell. Hence, the learned Judge was plainly in error when he declared that the business, and consequently the land on which the business was situated, was not part of the estate.

[46] Clearly, the issues which the defendants seek to litigate have already been litigated as evident from the above findings of the Court of Appeal which was final. It was thus binding on the court and all parties and may not be reopened the same. (see *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57). It is therefore in my considered view that the plaintiffs are estopped from raising a second time issues regarding the right to the deceased's estate.

[47] The second plaintiff in the present suit was evidently a party in the main suit and the first plaintiff was privy to some of the parties in the main suit. Cause of action estoppel, where applicable, is an absolute bar to re-litigation between the same parties or their privies (see the case of *Norma Awang Had & Nazli Awang Had (Suing as the administrators/Executors of the Estate of Tan Sri Dato' Awang Had Salleh, Deceased) & Anor v. Dato' Dr Haji Mohamed Haniffa Haji Abdullah* [2016] 1 LNS 1136). After taking into account the entire factual matrix of the case, I am of the considered view that the present action is in fact no more than a repetition, in thinly veiled new guise of the cause of earlier proceedings in the main suit which had been previously determined by the Court of Appeal in Rayuan Sivil No. T-02(NCVC)(W)-37-01-2016 and tantamount to an abuse of the process of the court. For the foregoing reasons above, I agree with the defendants' contention that this instant case was clearly caught by the doctrine of *res judicata* and should therefore be struck out.

Conclusion

[48] Accordingly, for all the reasons given above, I am of the considered opinion that the plaintiffs' action is obviously unsustainable as it is caught by O. 18 r. 19(1)(a), (b) and/or (d) of the RC 2012. It is therefore a plain and obvious case to be struck out. I hereby allow the defendants' application to strike out the plaintiffs' claim against them with costs.